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No. 89-701

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TUOLUMNE PARK AND RECREATION DISTRICT, and FRIENDS OF SIERRA RAILROAD, INC., *Petitioners*,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, RAILS-TO-TRAILS CONSERVANCY, CALIFORNIA PRESERVATION FOUNDATION, SOCIETY FOR HISTORICAL ARCHAEOLOGY, SOCIETY FOR CALIFORNIA ARCHAEOLOGY, AND TUOLUMNE COUNTY HISTORICAL SOCIETY, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit's refusal to exercise jurisdiction over a timely petition to review the Interstate Commerce Commission's conceded failure to comply with its non-discretionary duties under the National Environmental Policy Act (NEPA), and Section 106 of the National Historic Preservation Act (NHPA), wrongfully forecloses judicial review of agency compliance with these mandatory environmental statutes, in contravention of Congress' grant of private enforcement authority under the NHPA and NEPA, and the judicial policy favoring a "searching" standard of review for agency decisions to avoid compliance with environmental review statutes?

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MOTION OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION, *ET AL.* FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The National Trust for Historic Preservation in the United States, Rails-to-Trails Conservancy, California Preservation Foundation, Society for Historical Archaeology, Society for California Archaeology, and Tuolumne County Historical Society, respectively petition this Court pursuant to Rule 36.3 for leave to file an *amicus curiae* brief, filed simultaneously herewith, in support of Petitioners in the above-captioned Petition for Writ of Certiorari to the Ninth Circuit.[1]

The Solicitor General of the United States has consented on behalf of Respondent Interstate Commerce Commission ("ICC") to the filing of this brief, as have the Petitioners Friends of Sierra Railroad and Tuolumne Park and Recreation District, as evidenced by letters filed with the Clerk of this Court. However, Respondent Fibreboard Corporation has declined to grant consent to the filing of this *amicus* brief, necessitating this motion.

The National Trust's expertise on federal historic preservation law is nationally recognized, particularly with respect to Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f. The National Trust has frequently filed *amicus* briefs (and has participated as a plaintiff) in cases involving the enforce-

[1] The interests of the *amici* organizations are described more fully in the Appendix to this *Amicus* Brief in Support of the Petition for a Writ of Certiorari. (Amicus App. 1a)

ment and interpretation of Section 106.[2] Thus, the filing of an *amicus* brief will assist this Court in evaluating the significant issues involved in this case, particularly the issues concerning compliance with the National Historic Preservation Act, which has never heretofore been reviewed by this Court.

Respectfully submitted,

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[2] For example, the National Trust has participated as a plaintiff or *amicus* in the following cases involving Section 106 of the NHPA: *Vieux Carre Property Owners, Residents & Associates, Inc. v. Brown*, 875 F.2d 453 (5th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3291 (U.S. Oct. 6, 1989) (No. 89-563) (*amicus* in support of cert. petition); *Lee v. Thornburgh*, 877 F.2d 1053 (D.C. Cir. 1989) (*amicus*); *Connecticut Trust for Historic Preservation v. Interstate Commerce Commission*, 841 F.2d 479 (2d Cir. 1988) (*amicus*); *National Trust for Historic Preservation v. U.S. Army Corps of Engineers*, 552 F. Supp. 784 (S.D. Ohio 1982) (plaintiff).

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AMICUS BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION, RAILS-TO-TRAILS CONSERVANCY, CALIFORNIA PRESERVATION FOUNDATION, SOCIETY FOR HISTORICAL ARCHAEOLOGY, SOCIETY FOR CALIFORNIA ARCHAEOLOGY, AND TUOLUMNE COUNTY HISTORICAL SOCIETY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTERESTS OF *AMICI CURIAE*

This brief is submitted by the National Trust for Historic Preservation in the United States, Rails-to-Trails Conservancy, California Preservation Foundation, Society for Historical Archaeology, Society for California Archaeology, and Tuolumne County Historical Society, as *amici curiae* pursuant to Rule 36.1 of the Rules of this Court, in support of the petition for a writ of certiorari to the United States Court of

Appeals for the Ninth Circuit. Consent to appear as *amici* has been obtained from the United States and from the petitioners, Friends of Sierra Railroad and Tuolumne Park and Recreation District, as evidenced by letters filed with the Clerk of this Court.

The Interstate Commerce Commission ("ICC") authorizes the abandonment of approximately 3000 miles of railroad lines each year. Many of these corridors either include or are adjacent to historic sites, such as archaeological sites, stone bridges, railroad depots, and other historic structures, or, as is the case here, are historically significant in their own right. *Amici* are national, state, and local organizations concerned with protecting these historic resources and enforcing federal agency compliance with the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 *et seq.*, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332. The interests of *amici* in the strong enforcement of federal environmental and historic preservation laws have been hampered by the conflicting and uncertain legal standards governing judicial review of the ICC and other licensing agencies subject to special review statutes, when those agencies fail to comply with environmental and historic preservation laws.[1]

The purpose of this *amicus* brief is to urge this Court to resolve this ongoing enforcement problem, an issue that is well-illustrated in this case, in which judicial review of the ICC's conceded failure to comply with the mandatory environmental review obligations of the NHPA and NEPA was wrongfully foreclosed,

[1] The interests of each *amicus curiae* are described in more detail in the Appendix to this brief. (Amicus App. 1a).

a result that subverts the legislative mandate of these important statutes.

STATEMENT OF THE CASE

A. Introduction

This case presents the question of whether Petitioners were deprived of adequate judicial review of the Interstate Commerce Commission's (ICC's) conceded failure[2] to engage in the environmental consultation and review processes mandated by NEPA, 42 U.S.C. § 4332, and Section 106 of the National Historic Preservation Act ("Section 106"), 16 U.S.C. § 470f, prior to authorizing the abandonment of the scenic and historic Sierra Railroad under the ICC's "exempt" railroad abandonment procedures.[3] In refusing to take jurisdiction over this case, the Ninth Circuit improperly deferred to the ICC's erroneous conclusion that the cursory notice required under the ICC's exempt abandonment regulations was sufficient to satisfy the notice requirements of NEPA and Section 106. The Ninth Circuit's refusal to review the ICC's unlawful action in this case underscores the need for this Court to review the unsettled questions

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[2] *See S.R. Investors, Ltd.—Abandonment—in Tuolumne County, CA*, Dkt. No. AB-239X (ICC, July 14, 1987), at 10 (Pet. App. 31a, 48a).

[3] These procedures allow certain railroads that have been out of service for more than two years to abandon their rights-of-way by using an accelerated procedure, under which the only notice provided to the public is through a general-purpose form sent to state public service agencies and published in the Federal Register. 49 U.S.C. § 10505; 49 C.F.R. § 1152.50.

over which the circuits are divided[4] regarding the adequacy of appellate judicial review where agencies subject to special review statutes such as the Hobbs Act, 28 U.S.C. § 2342, violate their clear, non-discretionary duties to comply with Section 106 and NEPA.

B. Statutory Background

NEPA and Section 106 impose important, mandatory obligations on federal agencies to evaluate the impact of federally-licensed activities on the environment and on historic properties before allowing actions that are potentially harmful to those resources to go forward. While "the agency is not constrained . . . from deciding that other values outweigh the environmental costs," compliance with NEPA's procedural requirements is not discretionary. *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1846 (1989); *Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97-98 (1983).

In addition to its function of providing relevant environmental information to government decisionmakers, NEPA also "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. at 1845. Under NEPA, the public is provided with the required notice through the prep-

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[4] *Compare Bywater Neighborhood Ass'n v. Tricarico*, 879 F.2d 165 (5th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3397 (U.S. Dec. 6, 1989) (No. 89-898) *with Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981).

aration and broad dissemination of an environmental assessment (EA) or an environmental impact statement (EIS), "which gives the public the assurance that the agency 'has indeed considered environmental concerns in its decisionmaking process,' . . . and, perhaps more significantly, provides a springboard for public comment." *Id.* (quoting *Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. at 97); *see also Illinois Commerce Commission v. ICC*, 848 F.2d 1246, 1260 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 783 (1989) ("The EA or EIS should provide a springboard for public comment, bringing to the agency viewpoints and options it might otherwise lack."). Dissemination of an EA or an EIS also serves the function of offering state and local governmental bodies "adequate notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner." *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. at 1846.

Like NEPA, Section 106 contemplates public notification and involvement in order to assist the agency in assessing the effects of its actions on historic properties and in considering mitigation measures. Under Section 106, where a federally licensed project or activity could affect historic properties, the agency must issue a formal assessment of the impact on historic properties, which assessment must be made in consultation with the State Historic Preservation Officer ("SHPO")[5] and the Advisory Council on His-

[5] The SHPO is the official in each state responsible for assisting federal agencies in carrying out their historic preservation responsibilities in the Section 106 consultation process, 36 C.F.R. § 800.1(c).

toric Preservation. 36 C.F.R. §§ 800.5, 800.6, 800.8. When the effect of the undertaking on historic properties will be adverse, the agency must consider ways in which this effect can be avoided or mitigated, and must "provide an adequate opportunity for members of the public to receive information and express their views, *id.* § 800.5(e)(3), and to participate as interested or consulting parties in this process. *Id.* § 800.5(e).[6]

The role of citizens acting as private attorneys general to enforce agency compliance with NEPA and Section 106 is well-established. Indeed, Congress has created an express, private right of action for "any citizen" to enforce the provisions of the National Historic Preservation Act. 16 U.S.C. § 470w-4; *see Vieux Carré Property Owners, Residents & Associates, Inc. v. Brown*, 875 F.2d 453, 457-58 (5th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3291 (U.S. Oct. 6, 1989) (No. 89-563).

NEPA enforcement actions are generally brought in two contexts: challenges to the sufficiency of an agency's consideration of impacts and alternatives, and challenges to an agency's refusal or failure to comply with NEPA at all. In reviewing the former,

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[6] If the agency determines that the action will have no effect on historic properties, that finding must be documented and transmitted to the SHPO, who has 15 days to object to the finding. *Id.* § 800.5(b). The agency must also notify "interested persons who have made their concerns known" to the agency. *Id.* If the agency determines that an action would have no *adverse* affect on historic properties, this finding must be documented and submitted to both the SHPO and the Advisory Council on Historic Preservation, which has 30 days to object to the finding. *Id.* § 800.5(d).

courts have applied a more deferential, "arbitrary and capricious" standard. *See Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. at 97-98. However, judicial review of an agency's failure to assess environmental impacts in the first instance, as occurred here, is generally "subject to inspection under a more searching standard," recognizing that "[t]he spirit of [NEPA] would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review." *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973). *Accord, Foundation for North American Wild Sheep v. United States Dep't of Agriculture*, 681 F.2d 1172, 1177-78 (9th Cir. 1982).

C. History of the ICC's "Exempt" Abandonment Procedures

The ICC's "exempt" abandonment procedures involved in this case are applicable to railroads on which no local traffic has moved for at least two years, based on the ICC's determination that these rail lines do not require prior ICC review and approval to carry out national rail transportation policies. 49 C.F.R. § 1152.50. Carriers falling within this exemption may abandon their lines simply by providing "notice of exemption" to the ICC. Within 20 days after receiving the carrier's notice of exemption, the ICC must publish a notice of the abandonment in the Federal Register. *Id.* § 1152.50(d)(3). Today, the vast majority of railroad abandonments are processed through the ICC's "exempt" abandonment procedures.[7]

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[7] Interstate Commerce Commission, 1988 Annual Report, at 129 (1989) (more than 70 percent of all abandonments are pursuant to "exempt" procedures).

Since their adoption, the ICC's "exempt" abandonment regulations have been a source of controversy over the question of whether they allow abandonments to go forward without providing adequate public notice and opportunity to raise environmental and historic preservation concerns under Section 106 and NEPA. These concerns are rooted in the fact that the "exempt" abandonment procedures, on their face, allow railroad lines to be abandoned without preparation of an EA or an EIS, and instead only require that the railroad serve on certain state agencies an invitation to raise "relevant environmental and energy" concerns. *Id.* § 1105.11 (Appendix). Environmental objections may be raised by the public only after the fact, in the form of a petition to stay the abandonment, which must be filed within 10 days after publication of the notice of abandonment in the Federal Register, or in the form of a petition for reconsideration, which must be filed within 20 days of the Federal Register notice. *Id.* § 1152.50(d).

The Council on Environmental Quality (CEQ) has expressly found that the ICC's exempt abandonment procedures conflict with the requirements of NEPA by failing to provide adequate public notice of the abandonment and by "shift[ing] to intervenors a large part of the burden of evaluating environmental issues which Congress placed on agencies of the government such as the ICC when it passed NEPA."[8] Likewise, the Advisory Council on Historic Preservation has determined that these procedures violate Section 106 by allowing abandonments to go forward without con-

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[8] Letter from Dinah S. Bear, General Counsel, CEQ, to Robert S. Burk, ICC (Dec. 18, 1987) (Amicus App. 3a, 5a).

sulting with the State Historic Preservation Officer or providing the Advisory Council an opportunity to comment on the undertaking.[9] Even within the ICC, the exempt abandonment procedures have been criticized for failing to provide advance notice to the public sufficient to satisfy the statutory requirements of Section 106 and NEPA.[10]

These concerns regarding the incompatibility of the ICC's exempt abandonment procedures with NEPA and NHPA were raised before the D.C. Circuit in a direct challenge to the regulations, in *Illinois Commerce Commission v. ICC*, 848 F.2d 1246 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 783 (1989). In its decision, the D.C. Circuit expressed grave concerns about whether the procedures for abandoning railroads under these regulations conflicted with the public notice and participation requirements of NEPA and the NHPA, stating

> A railroad seeking an abandonment exemption must notify the state public service commission

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[9] Findings of a Panel of Advisory Council Members Convened on December 4th, 1987 to Consider Whether the Interstate Commerce Commission (ICC) Has Foreclosed the Council's Opportunity to Comment, in Violation of Section 106 of the National Historic Preservation Act, in Permitting the Exempt Abandonment of the Canal Branch of the Boston and Maine Railroad to Become Final in Accordance with 49 CFR § 1152.50. (Amicus App. 7a, 9a).

[10] *See* Memorandum from William R. Southard, Office of Transportation Analysis, ICC, to Donald Shaw, Office of Proceedings, ICC (July 31, 1986) (Pet. App. 59a) ("Given the very accelerated processing schedule involved in exempt proceedings, state historic preservation offices seldom become aware of railroad abandonment exemption proposals").

> ten days prior to filing the exemption provision. . . . *No EA would be available at that time, though, and so the usefulness of such notice to environmental groups is limited.* The Commission, moreover, does not advance any evidence that state public service agencies will perform this service, and, in fact, the Commission's own staff in comments concerning another exempt proceeding suggest that the state agencies do not carry out this function very well.

Id. at 1260 (emphasis added). The D.C. Circuit also recognized that "the Commission's reliance on private parties to raise environmental concerns was unlawful. The Commission may not delegate to parties and intervenors its own responsibility to independently investigate and assess the environmental impact of the proposal before it." *Id.* at 1258.

Notwithstanding these concerns, the D.C. Circuit declined to invalidate the regulations on their face, based on the ICC's simultaneous issuance of a statement promising to make environmental assessments available to the public before exempt abandonments were authorized, *id.* at 1258 n.23, and based on the ICC's verbal assurances at oral argument that it would allow 15 days from completion of the EA for intervenors to seek a stay, and that it would automatically grant a stay, if requested, until environmental concerns are resolved. The D.C. Circuit found that these procedures, if followed, would "obviate[ ] the possibility that abandonments would be authorized even though environmental questions were still outstanding." *Id.* at 1260. However, the court expressly stated that "[n]othing we decide here . . . affects the rights of these Petitioners or any others to challenge

the adequacy of the Commission's procedures as applied to a particular abandonment." *Id.* at 1258.

It is clear from the D.C. Circuit's decision that the exempt abandonment regulations would have been invalidated on their face but for the ICC's verbal assurances and unpublished policy statements that "exempt" abandonments will be carried out consistent with the NHPA and NEPA. Given this tenuous basis for the D.C. Circuit's decision, it is imperative that the ICC's case-by-case application of these regulations be subject to careful and exacting judicial review.

Yet here, the Ninth Circuit refused even to exercise jurisdiction over the ICC's conceded failure to apply its regulations consistent with its NEPA and Section 106 obligations. Not only did the ICC fail to provide an environmental assessment within five days of publishing the notice of abandonment in the Federal Register, but it also refused to automatically stay the abandonment until all environmental concerns were resolved—thus ignoring the very procedural assurances that saved the regulations from facial invalidity before the D.C. Circuit in *Illinois Commerce Commission v. ICC*.

Thus, the Ninth Circuit's decision has effectively insulated the ICC from any review at all precisely where judicial review is needed most. Review by this Court is necessary to resolve this tension between the mandatory commands of the NHPA and NEPA, and the limitations on judicial review afforded to the decisions of licensing agencies such as the ICC.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Erred in Denying Judicial Review of the ICC's Conceded Failure to Comply with Its Non-Discretionary Duties Under NEPA and Section 106.

This case clearly shows that the ICC, despite its assurances to the D.C. Circuit in *Illinois Commerce Commission v. ICC*, has failed to carry out its "exempt" abandonment proceedings consistent with the commands of NEPA and Section 106. The ICC has conceded in this case that it failed to comply with the requirements of NEPA and Section 106 that an environmental review and assessment document be prepared and circulated to the public and the appropriate agencies with sufficient time for meaningful comment prior to authorizing the abandonment of the Sierra Railroad.[11] And yet, incredibly, the ICC refused the requests made by the California State Historic Preservation Officer and the Advisory Council on Historic Preservation as well as by Petitioners to reopen the abandonment proceeding in order to comply with these statutes, on the ground that "Friends [of Sierra Railroad], the SHPO, and other California agencies all slept on their rights" by failing to raise their objections before the abandonment was approved.[12]

The most troublesome aspect of this case is not the ICC's legal error itself, but rather, the Ninth Circuit's failure to exercise jurisdiction in order to review it. Notwithstanding the ICC's admission that it failed to

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[11] *See S.R. Investors, Ltd.—Abandonment—in Tuolumne County, CA*, Dkt. No. AB-239X (ICC, July 14, 1987), at 10 (Pet. App. 31a, 48a).

[12] *Id.* (Pet. App. 48a).

comply with NEPA and Section 106, the Ninth Circuit held that Petitioners had received "adequate" notice of the abandonment, as defined by the ICC's flawed exempt abandonment regulations, and therefore that the preclusive doctrine of *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), rendered the ICC's noncompliance unreviewable.[13]

The Ninth Circuit erred in relying on the ICC's finding that the cursory, general purpose notice provided by the ICC to state public service agencies was legally sufficient to place Petitioners on notice of their opportunity to raise objections under NEPA and Section 106. It clearly was not. Even if this "notice" was adequate to trigger the public's opportunity to intervene on a timely basis to request a public use condition under the Revised Interstate Commerce Act, 49 U.S.C. § 10906, such "notice" is an impermissible substitute for the notice required by NEPA and Section 106—the preparation of an EA or an EIS, and transmittal of the required assessment of effects on historic properties to the California State Historic Preservation Officer and the Advisory Council on Historic Preservation. Until these documents are prepared and transmitted to the appropriate officials and

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[13] As the Ninth Circuit implicitly recognized below, *I.C.C. v. Brotherhood of Locomotive Engineers*, alone, does not purport to foreclose judicial review of the ICC's clearly erroneous refusal to reopen a proceeding, where the party seeking to reopen the proceeding did not have an adequate opportunity to raise these allegations in the original proceeding. Rather, this Court's decision in *Locomotive Engineers* reflects a concern that a rule not be fashioned to deprive a party "of all opportunity for judicial consideration—even on a 'clearest abuse of discretion' basis—of facts which, through no fault of his, the original proceeding did not contain." 482 U.S. at 280.

interested persons, the Petitioners by law did not receive legally sufficient notice of the abandonment. Any other result would permit the ICC to "shift[ ] to intervenors a large part of the burden of evaluating environmental issues which Congress placed on agencies of the government such as the ICC when it passed NEPA," by placing the burden on Petitioners to raise environmental objections *before* the ICC has prepared the necessary environmental review documents. *Harlem Valley Transportation Association v. Stafford*, 500 F.2d 328, 336 (2d Cir. 1974).[14] Thus, the ICC's determination, deferred to by the Ninth Circuit, that Petitioners "slept on their rights" to raise environmental objections, cannot be squared with the ICC's concession that Petitioners received no legally sufficient notice of those rights under NEPA and Section 106. (*See* Pet. App. 48a).

Ironically, the Ninth Circuit's refusal to review these NEPA and Section 106 violations has effectively foreclosed judicial review of the ICC's failure to comply with NEPA and Section 106 precisely where it is needed most—where the agency evades its environmental review obligations altogether. Insulating these clearly unlawful agency actions from judicial review subverts the basic policy that agency decisions not to comply with NEPA in the first instance should be subject to a "more searching standard" of judicial review than that applied to the adequacy of an agen-

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[14] In *Harlem Valley Transp. Ass'n v. Stafford*, the Second Circuit invalidated the ICC's procedures for complying with NEPA in its traditional (i.e., not "exempt") railroad abandonment proceedings because the ICC prepared environmental assessments only in response to public objections rather than using the environmental assessment process to elicit public comment.

cy's NEPA compliance, since decisions to avoid the assessment of impacts altogether "pretermit[ ] all consideration of that which Congress has directed be considered 'to the fullest extent possible.' " *Save Our Ten Acres v. Kreger*, 472 F.2d at 466. *Accord*, *Foundation for North American Wild Sheep v. United States Dep't of Agriculture*, 681 F.2d 1172, 1177-78 (9th Cir. 1982).[15]

II. This Court's Review Is Needed to Clarify the Unsettled Law Regarding Judicial Review Where "Hobbs Act" Agencies Violate Clear, Non-Discretionary Duties Under NEPA and Section 106.

The Ninth Circuit's ruling underscores a pervasive problem regarding the adequacy of judicial review of violations of NEPA and Section 106 by agencies such as the ICC that are subject to special review statutes, vesting exclusive review of agency actions in the courts of appeals.[16] The unsettled nature of the law in this context is well-illustrated by *Bywater Neighborhood Ass'n v. Tricarico*, 879 F.2d 165 (5th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3397 (U.S. Dec. 6, 1989) (No. 89-898). In that case, the Fifth Circuit held that the federal district court did not have jurisdiction to review a claim that the Federal

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[15] *But see Gee v. Hudson*, 746 F.2d 1471 (4th Cir. 1984), *cert. denied*, 471 U.S. 1058 (1985) (White, J., dissenting); *River Road Alliance, Inc. v. Corps of Engineers*, 764 F.2d 445 (7th Cir. 1985), *cert. denied*, 475 U.S. 1055 (1986) (White, J., dissenting).

[16] The ICC is subject to the Administrative Orders Review Act, 28 U.S.C. § 2342 (the "Hobbs Act"), which vests in the courts of appeals exclusive jurisdiction to review final "orders" of the ICC, the Federal Communications Commission, the Nuclear Regulatory Commission, and certain orders of the Secretary of Agriculture and the Federal Maritime Commission.

Communications Commission (FCC) failed to comply with Section 106 and NEPA in permitting the construction of several communications facilities in the center of the Bywater Historic District in New Orleans, since exclusive review of FCC licensing decisions was vested in the court of appeals. Instead, the court directed the plaintiff to file discretionary, after-the-fact petitions raising environmental objections with the agency, even though the environmental impacts had already occurred.[17]

As the Ninth Circuit's decision shows, the route prescribed by the Fifth Circuit in *Bywater*, by which "Hobbs Act" agencies must obtain judicial review of the agency's failure to comply with NEPA and Section 106, does not lead to meaningful judicial review but instead, has the result of foreclosing judicial review altogether. This problem is particularly acute where the agency's noncompliance with NEPA and Section 106 itself prevents public interest intervenors from raising environmental objections within the limited time-frames established by the agency.

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[17] *But see Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981), in which the Third Circuit held that the federal district court did have jurisdiction to review plaintiff's claim that the Nuclear Regulatory Commission (NRC) had failed to comply with NEPA prior to authorizing a nuclear power plant to discharge radioactive water into the Susquehanna River. However, in dissenting from the denial of the petition for certiorari, Justice Rehnquist argued that enforcement should have been sought initially with the agency, and then reviewed directly by the court of appeals. *General Public Utilities Corp. v. Susquehanna Valley Alliance*, 449 U.S. at 1099 (Rehnquist, J., dissenting) (citing *City of Rochester v. Bond*, 603 F.2d 927, 936-37 (D.C. Cir. 1979)).

Moreover, in such licensing proceedings, the sole opportunity to raise environmental objections is in the context of discretionary petitions to reopen the proceeding or requests for enforcement action. If judicial review of such discretionary actions is not barred altogether,[18] the scope of appellate review will often be prejudicially narrowed by the fact that the agency's regulations place the court in the position of reviewing a discretionary decision—i.e., the agency's disposition of a petition to stay, reconsider, or reopen the proceeding—rather than reviewing the agency's *non*-discretionary duties to comply with NEPA and Section 106. As the court noted in *Izaak Walton League v. Schlesinger*, 337 F. Supp. 287 (D.D.C. 1971):[19]

> Review of discretionary acts is more limited than agency actions that are compelled by statute. If plaintiffs' request to become parties before the AEC was denied their cry of failure to comply with NEPA would be unadjudicated. *Therefore, the Court may never be afforded opportunity to pass on the issue of whether the AEC failed to comply with the statutory mandate of NEPA.*

Id. at 293 (footnote omitted) (emphasis added).

When viewed together, the Fifth and Ninth Circuits have effectively foreclosed any judicial review of Section 106 and NEPA compliance by licensing agencies subject to special review statutes, thereby undermining Congress' express grant of private enforcement au-

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[18] *Cf. Heckler v. Chaney*, 470 U.S. 821 (1985).

[19] *Schlesinger* held that the district court had jurisdiction to review claims that the Atomic Energy Commission failed to comply with NEPA when it allowed interim operation of a nuclear power plant.

thority under the NHPA, 16 U.S.C. § 470w-4, and the strong judicial policy favoring private enforcement of NEPA. Accordingly, this Court's review is needed to clarify the important questions of the adequacy of judicial review when Hobbs Act agencies fail to comply with their mandatory obligations under NEPA and Section 106, and to halt the growing trend of now two circuits, the Fifth and the Ninth, to foreclose judicial review where a licensing agency completely avoids compliance with these important environmental review statutes.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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January 2, 1990

APPENDIX

APPENDIX

Interests of *Amici Curiae* Organizations

National Trust for Historic Preservation

The National Trust for Historic Preservation in the United States was chartered by Congress in 1949 as a private, nonprofit organization, to promote public involvement in the protection of America's historic resources and to further the historic preservation policy of the United States. *See* 16 U.S.C. § 468, 461-467. The National Trust currently has more than 225,000 individual and 3000 organizational members nationwide. The National Trust's Chairman is by statute a member of the Advisory Council on Historic Preservation, *id.* § 470i(a)(i)(8), an independent federal agency, which is responsible for implementing the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 *et seq.*, and for commenting on federal undertakings affecting historic resources. *See id.* §§ 470s, 470f. The Advisory Council's duties also include reviewing the policies and programs of other federal agencies to ensure consistency with the historic preservation policies adopted by Congress. *See id.* §§ 470, 470j.

Rails-to-Trails Conservancy

The Rails-to-Trails Conservancy is a nonprofit public interest corporation with approximately 60,000 members dedicated to fostering the preservation of abandoned and about-to-be-abandoned railroad rights-of-way for continued present and future public use, including for recreational trails and other compatible uses, and railbanking.

California Preservation Foundation

The California Preservation Foundation is a California nonprofit corporation dedicated to promoting historic preservation through awareness and education. The foundation, a statewide group with over 1,000 individual and organizational members, assists local and regional groups

throughout California. The California Preservation Foundation has been active for many years in assisting the efforts to save the Sierra Railroad.

Society for Historical Archaeology

The Society for Historical Archaeology is a nonprofit scientific and educational organization with more than 2000 members, which aims to promote scholarly research and dissemination of knowledge concerning historical archaeology. The Society is specifically concerned with the identification, interpretation, and conservation of sites and materials on land and under water.

Society for California Archaeology

The Society for California Archaeology is a nonprofit scientific and educational corporation with a membership of over 600 professional archaeologists, students, and avocationals in California, dedicated to the study and preservation of heritage resources, both historic and prehistoric.

Tuolumne County Historical Society

The Tuolumne County Historical Society was established in 1956 as a nonprofit corporation chartered to "record, preserve, protect, and disseminate" the history of Tuolumne County, California. The Society promotes and urges protection of the Sierra Railroad, which is historically significant in the economic, social, and political development of the county and the larger central Sierra Region.

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
722 Jackson Place, N.W.
Washington, D.C. 20503

December 18, 1987

Mr. Robert S. Burk
General Counsel
Interstate Commerce Commission
12th Street and Constitution Ave., N.W.
Washington, D.C. 20423

RE: Proposed Amendments to ICC Procedures Implementing the National Environmental Policy Act; Ex Parte No. 55 (Sub-No. 22A)

Dear Mr. Burk:

Last week, I met with Louis Mackall and Ellen Hansen of your office, as well as Carl Bausch, Chief of the ICC's Section of Energy and Environment, to discuss the above-captioned proposed amendments. As you may know, CEQ generally reviews an agency's proposed NEPA procedures or amendments to NEPA procedures in the initial draft stages, and works with the agency throughout the process. Prior to publication of procedures in final form in the Federal Register, CEQ issues, if appropriate, a letter indicating that the agency's procedures are consistent with the CEQ regulations.

During our meeting, I mentioned a number of concerns about the draft ICC procedures. Some of these are minor; others are more significant. Mr. Mackall suggested that I summarize these concerns in writing. I am hopeful that all of them can be resolved to the mutual satisfaction of CEQ and the ICC.

I understand that the ICC wishes to publishes [sic] the draft regulations in the Federal Register as soon as possible. While that it [sic] is certainly a matter of discretion

on the part of the ICC, I wanted to summarize for you my concerns about the current draft proposed amendments.

Timing of NEPA Compliance for Classes for Exempted Actions: The ICC maintains that it is not required to complete the NEPA process prior to publication of a notice of exemption for an action because the notice itself is not a decision; rather, it is a public information notice. The ICC argues that the "real" decision took place at the time the Commission determined to exempt certain classes of actions from normal regulation. If, the ICC says, someone raises an environmental issue in a timely manner, the proceeding will then be stayed and appropriate NEPA compliance will occur.

It appears to me that this line of argument is flawed and disingenuous. First, if the only decision point in the exemption process is the ICC's decision to designate a certain class of actions as exempt (which, whether it is the *only* decision point or not, I would certainly view as a decision), then one would expect the ICC to have fully and comprehensively complied with NEPA at that time. Instead, the ICC is apparently relying on an "environmental memorandum" prepared by the Section on Energy and Environment, which, the agency is [sic] argues, is the "functional equivalent" of a NEPA document. The "functional equivalent" doctrine applies *only* to certain activities of the Environmental Protection Agency (EPA) in administering certain environmental statutes. The doctrine has developed because of concern on the part of Congress and the courts that compliance with the procedural requirements of NEPA would delay EPA's implementation of statutes which were written for the purpose of environmental protection. It has been applied only to EPA, because of EPA's unique situation in the federal government in having an environmentally protective mission as its primary goal, and it is applied only to those statutes which provide for the "functional equivalent" of the NEPA proc-

ess (for example, analysis of alternatives and public participation). The courts have rejected attempts by other agencies to use the functional equivalence doctrine, even when part of an agency's mission is an environmental function. *Texas Committee on Natural Resources v. Bergland*, 573 F.2d 201 (5th Cir. 1978). The ICC's claim to the functional equivalent doctrine is, frankly, untenable.

Even assuming, however, that the ICC had properly analyzed the environmental impacts of its class exemption regulations in an environmental assessment or an environmental impact statement, the argument that the notice of exemption is not a decision is suspect. It appears to me that the rights of the parties involved in the action are determined by the notice unless someone intervenes. The fact that a proceeding may be stayed by a party raising environmental concerns demonstrates that there is an opportunity for the Commission to make an [sic] reasoned decision among alternative courses of actions. The ICC apparently believes that the very existence of this opportunity proves that there is adequate compliance with the environmental laws. However, this scheme also proves that there is a further decision point, at which point compliance with environmental statutes, including NEPA, is [sic] occurs only upon petition of an outside party. Thus, the agency appears to be reflecting much the same attitude as it did in 1974, when the Second Circuit Court of Appeals observed that:

> "The ICC is apparently content to place the burden on interveners whose resources might be limited to challenge any environmental statements that the railroads might make in their applications for abandonment. If interveners do not challenge these statements, they may be accepted as true. This passive approach by the Commission shifts to interveners a large part of the burden of evaluating environmental issues which Congress placed on agencies of the government such

as the ICC when it passed NEPA." *Harlem Valley v. Stafford*, 500 F.2d 328, 336 (2d Cir. 1974).

In our discussions on December 11, 1987, Mr. Mackall cited *Illinois Commerce Commission v. ICC*, 787 F.2d 616 (D.C. Cir. 1986), and *Crounse Corp. v. ICC*, 781 F.2d 1176 (6th Cir. 1986), as providing authority which approved the manner in which the ICC conducts its NEPA compliance for exempted classes of actions. Neither of these cases stand for the proposition cited. The first case does not even reference NEPA, but rather deals with challenges against the deregulation of abandonment actions for out-of-service lines based on other causes of action. *Crounse Corp. v. ICC* does include a NEPA cause of action, but the underlying action (an acquisition) was not in the exempted class, and the court, rather than dealing with the timing issue, merely held that the ICC's decision not to prepare an environmental impact statement, based upon the analysis in an environmental assessment, was adequate. In short, neither case supports the ICC's treatment of exempted actions under NEPA.

* * * *

I am aware that the ICC is currently in litigation which involves some of the issues raised in this letter; principally, those issues relating to overall NEPA compliance for exempted classes of action. This situation makes discussion of these matters rather more sensitive; however, the ICC's proposed amendment also makes the discussion imperative. I would be happy to meet with you to discuss these issues in further detail, or to continue working with your staff and the staff of the SEE.

Yours truly,

Dinah Bear
General Counsel

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Advisory Council On
Historic Preservation

The Old Post Office Building
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FINDINGS OF A PANEL OF ADVISORY COUNCIL MEMBERS CONVENED ON DECEMBER 4TH, 1987 TO CONSIDER WHETHER THE INTERSTATE COMMERCE COMMISSION (ICC) HAS FORECLOSED THE COUNCIL'S OPPORTUNITY TO COMMENT, IN VIOLATION OF SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT, IN PERMITTING THE EXEMPT ABANDONMENT OF THE CANAL BRANCH OF THE BOSTON AND MAINE RAILROAD TO BECOME FINAL IN ACCORDANCE WITH 49 CFR § 1152.50

1. By allowing the exempt abandonment of the Canal Branch to become final on April 16, 1987 before it sought the comments of the Council pursuant to Section 106 and 36 CFR Part 800, ICC foreclosed the Council's opportunity to comment on abandonment of the Canal Branch as a whole.

2. The Council conditionally retains a reasonable opportunity to comment on the undertaking as it directly affects those properties along the Canal Branch right-of-way that are presently known to be eligible for the National Register, provided that ICC will: (a) impose a reasonable length of time (approximately up to 120 days) public use condition on the abandonment of the remaining unsold portion of the Branch; (b) extend the effective date of its November 25 decision concerning the abandonment for the period of the public use condition; and (c) consult with the Council's staff, the Connecticut State Historic Preservation Officer, and other interested parties to consider ways to preserve such properties through public use or other means.

3. In the event that ICC will take the actions identified in paragraph 2, this panel would suggest that the Council recommend mitigation actions to be taken by ICC, including but not limited to:

(a) marketing those portions of the Canal Branch not already disposed of, or if necessary, smaller portions of the Canal Branch containing historic properties, to public entities or others who will preserve them in appropriate contemporary use;

(b) marketing such sections subject to preservation restrictions;

(c) documenting historic properties prior to their demolition or disposition, in a manner consistent with the *Secretary of the Interior's Standards and Guidelines for Architectural and Engineering Documentation* (48 FR 44730-34); and

(d) ensuring consultation with the Connecticut State Historic Preservation Officer and other interested parties prior to the demolition of any historic property, and making possible the recovery of materials and data from any such property by or on behalf of such parties.

4. If ICC does not take the actions outlined in paragraph 2 within a reasonable length of time, the panel will reconvene to reconsider whether the Council's opportunity to comment has been foreclosed with respect to the undertaking's direct effects on those properties along the Canal Branch right-of-way that are presently known to be eligible for the National Register.

5. Because ICC's procedures for exempt abandonments (49 CFR § 1152.50) are presently not compatible with the timely consideration of effects on historic properties and appear likely to lead to "ministerial errors" like the one that occurred in this case, which may lead to foreclosure of the Council's opportunity to comment, ICC should immediately examine its procedures, in consultation with the Council's

staff and other interested parties, to improve coordination between those procedures and Section 106.

6. Because of the particular issues and complexities peculiar to this case the findings of this panel in paragraphs 1 through 4 are not to be taken as precedent for the findings of the Council with respect to other potential foreclosure situations.